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Sherman B. Hinckley and Bonneville on the Hill Co. v. Robert B. Swaner, Peter B. Swaner et al : Brief of Respondents

Utah Supreme Court

James E. Faust; Attorney for Appellants;
Marr, Wilkins & Cannon; Attorneys for Respondents;

IN THE SUPREME COURT
of the
STATE OF UTAH

SHERMAN B. HINCKLEY and BONNEVILLE ON THE HILL COMPANY,
Plaintiffs and Respondents,

vs.

ROBERT B. SWANER, PETER B. SWANER, and NORTH POINT CONSOLIDATED IRRIGATION COMPANY,
Defendants and Appellants.

Civil No. 9560

BRIEF OF RESPONDENTS

DISTRICT COURT OF SALT LAKE COUNTY
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BRIEF OF RESPONDENTS

Respondents agree with the statement of facts and the issues as framed by the statement of points set forth in Appellants' Brief.

Plaintiffs and respondents filed their complaint praying for a declaratory judgment that the stockholders of North Point Consolidated Irrigation Company did legally increase the number of directors from four to five, and that Sherman B. Hinckley was lawfully elected to the office of director. Plaintiffs' cause of action is based upon Chapter 33 of the Judicial Code pertaining to Declaratory Judgments (78-33-1 et seq. U. C. A. 1953) and also upon Rule 65B(b)(3) of the Rules of Civil Procedure. This rule abolished the special Writ of Quo Warranto, but provides in its stead:

> "(b) Appropriate relief may be granted:
> (3) . . . to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully excluded by such. . . corporation, board or person."

In granting plaintiffs' Motion for Summary Judgment, the trial court ruled that the stockholders of the company did legally increase the number of directors from four to five, that Sherman B. Hinckley was lawfully elected to the office of director and ordered that the defendants admit Sherman B. Hinckley to the office of Director of the company.

The simple issue involved is whether or not the change from four to five directors made July 5, 1961, at the special stockholders' meeting constitutes an amendment to the articles of incorporation of North Point Consolidated Irrigation Company. Appellants contend that the articles did in effect have to be amended, and therefore a two-thirds vote was necessary to fix the number of directors at five. Respondents contend that Article XXI gives the stockholders a leeway to change the number of directors between four and six, and within such limits a bare majority is all that is required to carry the motion.

POINT I

Article XXI of North Point's articles of incorporation provide as follows:

> "That there shall be elected by ballot by the stockholders of this corporation at each annual stockholders' meeting or at a special meeting called for

> that purpose, *a Board of Directors consisting of not less than four nor more than six* and until otherwise determined by the stockholders, the Board of Directors shall consist of four members."

It seems clear to counsel for Respondents, as it was to the trial court, that Article XXI permits the stockholders to have a board of directors of either four, five or six, without the necessity of any amendment thereto. The stockholders have been given leeway to choose the number of directors to serve the corporation within the limits prescribed. This variable number of directors conforms to the same intent and purpose as historically provided in the Utah statutes. Section 16-2-5 U. C. A. 1953, or its predecessor, has always provided:

> ". . . that in no case shall the number of directors be less than three or more than twenty five."

To argue as Appellants do, that it requires an amendment to the articles of incorporation to change the number of directors from four to five gives no meaning or effect to the above italicized language from Article XXI. Any articles of incorporation can always be amended. The only possible interpretation which can be given to the clause, ". . . not less than four or more than six. . ." is that which the trial court adopted. Within these limits the stockholders were free to act without necessity of amending the articles.

There is no ambiguity involved. The plain, simple interpretation of Article XXI permitted the stockholders to change the number of directors from four to five upon

motion duly made and carried by a simple majority as required in Article XXIV. This article pertaining to stockholders' meetings is set forth in full at page 5 of Appellants' Brief. Its pertinent provisions provide:

> "A majority of a quorum shall be requisite for the passing, confirming or adopting of any act, motion, or resolution."

This provision does not change the rule stated in Section 16-2-43 U. C. A. 1953 that in the absence of a contrary provision every question or election at a stockholders' meeting shall be decided by a majority of the votes cast.

In 1953 the Legislature amended 16-2-24 pertaining to Election of Directors to require a notice of such change of number of directors to be reported in writing to the Secretary of State. The amendment was drafted to retain and leave unimpaired all rights of stockholders theretofore existing in regard to changing the number of directors. The first sentence of the amendment stated:

> "If the number of directors provided for in the articles of incorporation or other certificates filed pursuant to law be not less than a stated minimum nor more than a stated maximum, and if the articles of incorporation so authorize, the number of directors to be chosen within such maximum and minimum limits shall be determined by or in the manner prescribed by the articles of incorporation."

This clause recognizes the common corporate practice of providing for a variable number of directors. It goes on to state that the change in number shall be determined in the manner prescribed by the articles of incorporation.

The general law on the subject is stated in Volume 5, Section 2020 of Fletcher, Cyclopedia of the Law of Corporation (1952 Revised Volume) as follows:

> "'It is of the essence of all elections that the will of the majority, properly expressed, shall govern.' Usually the vote of a majority of those present at a meeting is necessary to elect officers or to decide any question, provided a quorum is present, so that the meeting may be legally held. Such majority of those present is sufficient to elect directors or other officers, or to decide any question, unless there is some express provision to the contrary, although they may not be a majority of all the stockholders or members, nor own a majority of the stock."

Majority rule is an ancient, well recognized principle of corporate law. In deciding a similar case pertaining to the election of directors, the Supreme Court of Delaware stated:

> "We commence with the thought that corporate enterprise should adhere to well established democratic theories, which embody principles of fairness and reasonableness as opposed to principles which are unfair and unreasonable. Shareholders, constituting the backbone of corporate enterprise, must be assured in this respect.
>
> "Outstanding among the democratic processes concerning corporate elections is the general rule that a majority of the votes cast at a stockholders' meeting, provided a quorum is present, is sufficient to elect Directors. Hexter v. Columbia Baking Co., 16 Del.Ch. 263, 145 A. 115; 5 Fletcher's Cyc. Corp. (Perm. Ed.) Sec. 2020. If this rule is not to be observed, then the

> charter provision must not be couched in ambiguous language, rather the language employed must be positive, explicit, clear and readily understandable and susceptable to but one reasonble interpretation, which would indicate beyond doubt that the rule was intended to be abrogated." (Standard Power & Light Corp. -v- Investment Associates, Delaware 1947, 51 A2d 572.)

To the same effect see Christal v. Petry, 90 N. Y. S. 2d 620.

Appellants cite no authorities in support of their contentions, but on the contrary express their views as to why a majority of the stockholders desire to increase the number of directors. The reasons actuating the majority of the stockholders in so doing are irrelevant to the issue as to how, under the articles of incorporation, such change may be made. Experience may have demonstrated that the busines of the corporation cannot well be conducted by a board of four members or that an increase or decrease to an odd number might be beneficial, but that again is immaterial. The question is as to the power, not the motive, of the majority in interest of the stockholders to make such a change.

That, as Appellants impliedly recognize by citing no authorities, must be determined by the clear and simple provision of Article XXI of the articles of incorporation.

In conclusion, Respondents submit that the Motion for Summary Judgment was properly granted. The only

possible interpretation that can be given to the clause "... a Board of Directors consisting of not less than four nor more than six..." is that permitting the stockholders to change the number from four to five within the framework of the present articles of incorporation.

Respectfully submitted,

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